Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM T. WARTHEN AND HARRY J. WARTHEN, III
Petitioners,

v.

LARRY DANE SMITH, II
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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6 + PP

I. QUESTION PRESENTED

Whether 11 U.S.C. § 506(d), as interpreted by the Court in Dewsnup v. Timm, 502 U.S. 410 (1992), precludes a debtor in a chapter 7 bankruptcy case from "stripping off" non-consensual judgment liens that currently have no value?

II. PARTIES

All the parties to the proceedings below are identified in the caption of this case except W. Stephen Scott, the chapter 7 bankruptcy trustee of Respondent, Larry Dane Smith, II. Although Mr. Scott was served with the pleadings filed in connection with the proceedings before the bankruptcy court in this case, he did not participate in those proceedings and ceased to be a party in interest when he abandoned the bankruptcy estate's interest in the real property to which the judgment liens at issue in this case attached.

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V. LOWER COURT CASE CITATIONS

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix 1 and is unpublished, but reported electronically at 2001 WL 22918 (4th Cir. Jan. 10, 2001).

The order and memorandum opinion of the United States District Court for the Western District of Virginia appears at Appendix 8, and is reported at 247 B.R. 191 (W.D. Va. 2000).

The order and memorandum opinion of the United States Bankruptcy Court for the Western District of Virginia appears at Appendix 23 and is unpublished.

VI. STATEMENT OF JURISDICTION

Petitioners, William T. Warthen and Harry J. Warthen, III, seek review of an opinion issued by the United States Court of Appeals for the Fourth Circuit on January 10, 2001. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

VII. STATUTORY PROVISIONS

A. 11 U.S.C. § 506(a).

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of

such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

B. 11 U.S.C. § 506(d).

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

C. 11 U.S.C. § 502, reprinted at App. 38.

VIII. STATEMENT OF THE CASE

The Warthens' Judgments

On June 30, 1998, a jury in the Circuit Court for the City of Richmond, Virginia awarded judgments against the Respondent, Larry Dane Smith, II (the "Debtor"), to Petitioners, William T. Warthen and Harry J. Warthen, III (together, the "Warthens"), in the amounts of $280,000.00 and $56,722.41, respectively. App. 2. The lawsuit was triggered by an auto accident in which the Debtor was at fault. App. 2. The jury awarded damages for permanent

physical injury suffered by William T. Warthen, a minor at the time of the accident, as well as incidental medical costs expended by William's father, Harry J. Warthen, III. App.2-3.

The Real Property and its Encumbrances

The Debtor owns an undivided one-half interest as a tenant in common in certain real property and improvements located near Palmyra in Fluvanna County, Virginia (the "Real Property") App. 3. The Real Property's assessed value is $64,600, but the Real Property is encumbered by a first mortgage lien in the amount of $70,768.38. App. 3. Accordingly, the Debtor has no equity in the Real Property. App. 3. Nevertheless, the Warthens proceeded to docket their judgments in the land records of Fluvanna County, Virginia on July 8, 1998, and thus, under Virginia law, obtained judicial liens against the Debtor's interest in Real Property. App. 3.

The Debtor's Chapter 7 Bankruptcy Case

On September 30, 1998, the Debtor filed a voluntary petition for relief under chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Western District of Virginia. App. 3. The Warthens did not file proofs of claim for their judgments in the Debtor's bankruptcy case, relying instead on the principal that their judicial liens on the Real Property would "pass through" bankruptcy unaffected. App. 6 n.2. The Debtor, however, filed pleadings with the bankruptcy court seeking various remedies against the Warthens' judicial liens on the Real Property, including a request that such liens be "voided" under § 506(d) of the Bankruptcy Code. App. 3-4. Because the facts of the case were undisputed, each side moved for summary judgment

pursuant to Fed. R. Civ. P. 56(b), as incorporated by Fed. R. Bankr. P. 7056(b). App. 4. In their motion for summary judgment, the Warthens argued that the Court's interpretation of § 506(d) enunciated in Dewsnup v. Timm, 502 U.S. 410 (1992), precluded the Debtor from using that statute to void the Warthens' judicial liens as a matter of law. App. 32.

The Bankruptcy Court's Ruling

On May 21, 1999, the bankruptcy court entered an order and corresponding memorandum opinion denying the Warthens' motions for summary judgment with respect to § 506(d) and granting the Debtor's motion to void the Warthens' judicial liens under § 506(d). App. 23-37. The bankruptcy court distinguished Dewsnup as a case involving the "stripping down" of an "undersecured" lien—a lien that has some value, albeit not enough to secure the attendant claim in full—rather than the "stripping off" of a "wholly unsecured" lien—a lien that currently has no value at all. App. 31-34. The bankruptcy court reasoned that wholly unsecured liens, such as the Warthens' judicial liens, do not secure "allowed secured claims" within the meaning of § 506(d) and, therefore, can be "stripped off" under § 506(d). App. 33-34.

The District Court's Ruling

The Warthens appealed the bankruptcy court's ruling to the United States District Court for the Western District of Virginia. App. 7; see 28 U.S.C. § 158(a). In an order and memorandum opinion issued on March 14, 2000, the district court affirmed the bankruptcy court's ruling. App. 8-22. Like the bankruptcy court, the district court distinguished Dewsnup on the ground that it involved the stripping down of an undersecured lien, rather than the stripping off of a wholly unsecured lien. App. 18-

19. However, the district court also distinguished Dewsnup as a case involving a consensual mortgage lien, rather than a non-consensual judgment lien, such as those held by the Warthens. App. 17-18.

The Fourth Circuit's Ruling

The Warthens appealed the district court's affirmance of the bankruptcy court's ruling to the United States Court of Appeals for the Fourth Circuit. App. 7; see 28 U.S.C. § 1291. Following the majority of lower federal courts, the Warthens argued that the Court's interpretation of § 506(d) in Dewsnup precludes the "stripping off" of "wholly unsecured" non-consensual judgment liens like the Warthens' judicial liens every bit as much as that interpretation precludes the "stripping down" of "undersecured" consensual mortgage liens. Finding itself in "substantial agreement" with the "analysis and conclusions" of the bankruptcy court and the district court, the Fourth Circuit issued a *per curiam* unpublished opinion affirming the voiding of the Warthens' judicial liens on the reasoning of the lower courts in their respective memorandum opinions. App. 7. The Fourth Circuit observed that the bankruptcy court had discerned nothing in the Court's decision in Dewsnup "that would preclude a worthless lien from being 'stripped off' to effectuate the broad policy goals of the bankruptcy laws." App. 6-7. The Fourth Circuit followed that observation with the following footnote:

> In Dewsnup, the Supreme Court implicitly endorsed the view of the respondents therein that "the 'fresh start' policy cannot justify an impairment of [the lienholders'] property rights." In this case, however, the Warthens' property rights are not significantly impaired; if the Real Property were sold at

> market value, all of the proceeds would be used to satisfy the mortgage debt. Nothing would be distributed to the Warthens.

App. 7 n.3 (citation omitted).

IX. ARGUMENT

This case presents the Court with a rare opportunity to resolve an important, widespread and recurring issue in consumer bankruptcy law—the ability of a chapter 7 debtor to void or "strip off" non-consensual judgment liens that happen to lack value upon the commencement of bankruptcy. Although this issue appeared to have been resolved by the interpretation of § 506(d) of the Bankruptcy Code enunciated by the Court in Dewsnup v. Timm, 502 U.S. 410 (1992), lower federal courts have persisted in developing result-oriented bases for distinguishing Dewsnup and remain evenly divided on the issue. The Fourth Circuit's decision in this case demands review because the interpretation of § 506(d) it relied upon to strip off the Warthens' judicial liens is squarely inconsistent with the interpretation given that statute by the Court in Dewsnup and because it directly conflicts with the holding of the United States Bankruptcy Appellate Panel of the Ninth Circuit in Laskin v. First Nat'l Bank of Keystone (In re Laskin), 222 B.R. 872 (B.A.P. 9th Cir. 1998). Additionally, the ever-growing division among district courts and bankruptcy courts on this issue and the resulting lack of uniformity of treatment from jurisdiction to jurisdiction call out for definitive guidance from the Court.

A. The Court Must Resolve the Conflict Between the Interpretation of § 506(d) Articulated by the Court in Dewsnup v. Timm and the Interpretation of That Statute Adopted by the Fourth Circuit.

In Dewsnup v. Timm, 502 U.S. 410 (1992), the Court held that § 506(d) of the Bankruptcy Code does not permit a debtor in a Chapter 7 bankruptcy case to "strip down" a lien, i.e., to void a lien to the extent its judicially determined value is less than the amount of the claim it secures. In so holding, the Court interpreted § 506(d) as serving the "simple and sensible function" of voiding a lien when the claim the lien secures has not been allowed under § 502 of the Bankruptcy Code. Id. at 415-16. Under the Court's interpretation of § 506(d) in Dewsnup, if the lien secures a claim that is allowable under § 502, that ends the inquiry: § 506(d) has no application, and the lien cannot be voided, even if the lien is worth significantly less than the amount of the claim. See id. The Court in Dewsnup expressly rejected the argument that a claim is "secured" under § 506(d), and the corresponding lien immunized from being voided under § 506(d), only to the extent of the judicially determined value of the lien under § 506(a) of the Bankruptcy Code. Id. at 416-17. Under Dewsnup, allowability of the claim secured by the lien is the touchstone; value of the lien is irrelevant. E.g., Lawrence P. King, Collier on Bankruptcy, ¶ 506.06[1][a] at 506-148 (15th ed. 2000) (stating that the Court in Dewsnup "determined that section 506(d) does not void liens on the basis of whether they are *secured* under section 506(a), but on the basis of whether the underlying claim is *allowed or disallowed* under section 502") (emphasis added).

In permitting the debtor in this case to "strip off" the Warthens' judicial liens, the Fourth Circuit adopted an interpretation of § 506(d) that is flatly inconsistent with the Court's interpretation of that statute in Dewsnup. By relying on the current lack of value in the Warthens' judicial liens as a basis for voiding those liens in their entirety under § 506(d), the Fourth Circuit effectively resurrected the value-driven interpretation of what it means to be "secured" under § 506(d) that the Court in Dewsnup expressly laid to rest. The rulings of the bankruptcy court and the district court below are predicated on the flawed legal premise that the Warthens' judgments do not qualify as "secured" claims under § 506(d) because the corresponding judicial liens currently are worthless. The notion that a lien's value determines its voidability under § 506(d) is precisely the proposition of law that was rejected by the Court in Dewsnup. The Fourth Circuit's affirmance of the lower courts' rulings in this case, therefore, directly conflicts with Dewsnup.[1]

The analysis and holding in Dewsnup teaches that the sole relevant criterion for determining the voidability of a lien under § 506(d) is whether the claim the lien secures is allowable under § 502 of the Bankruptcy Code. If that is so—if allowability of the claim, rather than value of the lien, is the critical inquiry—then not only is the current value of the Warthens' judicial liens irrelevant to their voidability, so, too, is the fact that the Warthens'

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[1] As Professor David Gray Carlson has pointed out, such an analysis also is inconsistent with United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), in which the Court ruled, *inter alia*, that a property interest does not lose its character as such simply because it currently has no value in the marketplace. David Gray Carlson, Bifurcation of Undersecured Claims in Bankruptcy, 70 Am. Bankr. L.J. 1, 25 (1996).

liens are non-consensual judicial liens rather than consensual mortgage liens. Accordingly, the lower courts' attempts in this case to distinguish Dewsnup on the ground that it involved consensual liens with some market value (albeit not enough to secure the related claim in its entirety), rather than non-consensual judicial liens that currently lack any value, are misguided. The Court in Dewsnup pronounced allowability of the claim as the dispositive criterion in determining the voidability of the lien under § 506(d),[2] and there is simply no principled basis on which to stray from the Court's interpretation merely because the liens at issue are non-consensual judicial liens that happen to lack value upon the commencement of bankruptcy.

The Fourth Circuit's decision in this case provides the Court with an appropriate vehicle for clarifying these important outstanding issues regarding the scope of the Court's holding in Dewsnup.

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[2] Although Dewsnup describes the sole criterion as whether a claim is "allowed" rather than "allowable," § 506(d)(2) makes it clear that the lien-voiding mechanism of § 506(d) does not apply to liens securing claims that have not been "allowed" solely because of the claimant's failure to file a proof of claim. E.g., Schroeder v. First Union National Bank of Virgnia, 182 B.R. 723, 724 n.2 (D. Md. 1995); see also App. 6 n.2.

B. The Court Must Resolve the Split Between the Fourth Circuit and the Ninth Circuit Bankruptcy Appellate Panel as to Whether 11 U.S.C. § 506(d) Precludes Debtors in Chapter 7 Bankruptcy Cases From "Stripping Off" Non-Consensual Judgment Liens That Lack Value.

The Fourth Circuit's decision also conflicts with the holding and rationale of the United States Bankruptcy Appellate Panel of the Ninth Circuit in Laskin v. First Nat'l Bank of Keystone (In re Laskin), 222 B.R. 872 (B.A.P. 9th Cir. 1998). In Laskin, the court held that debtors in "no asset" chapter 7 bankruptcy cases lack standing to use the lien-voiding mechanism of § 506(d). Id. at 874-75. The court reasoned that in "no asset" chapter 7 bankruptcies, no claims allowance proceedings take place; accordingly, such cases lack the essential predicate for voiding a lien under § 506(d)—disallowance of the related claim under § 502 of the Bankruptcy Code. Id.

In the alternative to that holding, which clearly comports with Dewsnup's emphasis on allowability of the claim instead of the value of the lien that secures the claim, the court in Laskin held that even if a debtor in a no-asset chapter 7 bankruptcy has standing to bring a lien voiding action under § 506(d), Dewsnup bars such a debtor from stripping off a wholly unsecured lien. Id. at 875-76. The Laskin court held that the underlying rationale of the Court's decision in Dewsnup, including the policies that liens should "pass through" bankruptcy unaffected and that any increase in the value of collateral should inure to the benefit of the creditor, are equally applicable when the lien sought to be voided is wholly unsecured. Id.

With the Fourth Circuit's decision in this case, there is now a mature split with the Ninth Circuit Bankruptcy Appellate Panel as to whether a lien's lack of value upon the commencement of bankruptcy permits the lien to be "stripped off" under § 506(d), as interpreted by the Court in Dewsnup.

C. The Court Must Provide Guidance to the Lower Federal Courts, Which are Evenly Divided on These Important Consumer Bankruptcy Issues.

Since Dewsnup, lower federal courts have generated nearly a decade's worth of inconsistent rulings on whether § 506(d) permits Chapter 7 debtors to strip off liens that happen to lack value upon the commencement of a bankruptcy case. Lower federal courts are equally divided on whether Dewsnup precludes the strip off (or strip down) of non-consensual liens, such as judgment liens, as opposed to consensual mortgage liens. Compare, e.g., Cater v. American Gen. Fin. (In re Cater), 240 B.R. 420 (M.D. Ala. 1999) (holding that Dewsnup precludes chapter 7 debtors from stripping off "wholly unsecured" mortgage liens under § 506(d); Schroeder v. First Union Nat'l Bank of Va., 182 B.R. 723, 724 (D. Md. 1995) (same as to judicial liens); In re Fitzmaurice, 248 B.R. 356 (Bankr. W.D. Mo. 2000) (same as to junior mortgage liens); Cunningham v. Homecomings Fin. Network (In re Cunningham), 246 B.R. 2 (Bankr. D. Md. 2000) (same; on appeal to the Fourth Circuit); Swiatek v. Pagliaro (In re Swiatek), 231 B.R. 26, 29 (Bankr. D. Del. 1999) (same as to judgment liens); In re Esler, 165 B.R. 583, 584 (Bankr. D. Md. 1994) (holding that Dewsnup applies equally to consensual and non-consensual liens and precludes the strip down of undersecured judgment liens in chapter 7 cases); In re Mershman, 158 B.R. 698, 703 (Bankr. N.D.

Ohio 1993) (citing cases and refusing to strip down valueless judicial lien in chapter 7 case under Dewsnup) with Yi v. Citibank (In re Yi), 219 B.R. 394 (E.D. Va. 1998) (distinguishing Dewsnup and permitting strip off of "wholly unsecured" junior mortgage in chapter 7 case); Farha v. First Am. Title Ins. (In re Farha), 246 B.R. 547 (Bankr. E.D. Mich. 2000) (denying motion to dismiss complaint to strip off "entirely unsecured" junior mortgage in chapter 7 case); Zempel v. Household Fin. Corp. (In re Zempel), 244 B.R. 625 (Bankr. W.D. Ky. 1999) (distinguishing Dewsnup and granting chapter 7 debtor's summary judgment motion seeking strip off of junior mortgage lien); Howard v. National Westminister Bank (In re Howard), 184 B.R. 644 (Bankr. E.D.N.Y. 1995) (distinguishing Dewsnup as a case involving a consensual mortgage lien and permitting strip off of wholly unsecured judicial lien in Chapter 7 case).

This case presents the Court with an important opportunity to resolve the widespread and growing disparity in treatment of these recurring consumer bankruptcy issues from jurisdiction to jurisdiction.

X. CONCLUSION

For the foregoing reasons, the Warthens respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this case.

WILLIAM T. WARTHEN
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April 10, 2001

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: LARRY DANE SMITH, II,
Debtor.

WILLIAM T. WARTHEN; HARRY J. WARTHEN, III,
Plaintiffs-Appellants,

v. No. 00-1454

LARRY DANE SMITH, II,
Defendant-Appellee,
W. STEPHEN SCOTT, Trustee,
Trustee.

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
James H. Michael Jr., Senior District Judge.
(CA-99-53-3, BK-98-2988)

Argued: December 7, 2000

Decided: January 10, 2001

Before WIDENER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Peter Stone Partee, Jr., HUNTON & WILLIAMS, Richmond, Virginia, for Appellants. C. Lamar Garren, SCOTT & KRONER, P.C., Charlottesville, Virginia, for Appellee.

ON BRIEF: Benjamin C. Ackerly, Sharon P. Lamb, HUNTON & WILLIAMS, Richmond, Virginia, for Appellants. Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

William T. Warthen and his father, Harry J. Warthen, III, appeal from the adverse decision of the district court for the Western District of Virginia. The Warthens contend that the court erred when, on March 14, 2000, it awarded summary judgment to Larry Dane Smith, II, by virtue of which the Warthens' judicial liens against Smith, a Chapter 7 bankruptcy debtor, were voided. Finding no error, we affirm.

I.

A. The facts underlying this appeal are not in dispute. The judicial liens at issue arose as a result of a civil lawsuit in the Circuit Court of the City of Richmond. In that action, a jury, on June 30, 1998, awarded judgments to the Warthens, and against Smith, in the sum of $336,722.41. That lawsuit emanated from an automobile accident in which Smith was at fault. The jury award included damages for permanent physical injury suffered

by William, a minor at the time of the accident, as well as incidental medical costs expended by his father. The Warthens docketed their judgments in the land records of Fluvanna County, Virginia, on July 8, 1998, and thus obtained judicial liens against Smith's real property and improvements located near Palmyra, in Fluvanna County (the "Real Property").

Smith has an undivided one-half interest in the Real Property as a tenant-in-common. The Real Property's assessed value is $64,600, of which half may be said to have accrued to Smith; it is encumbered, however, by a first mortgage in the sum of $70,768.38. Consequently, Smith has no equity in the Real Property. The mortgage, for which Smith is jointly and severally liable, predates the judicial liens at issue.

B. On September 30, 1998, Smith petitioned for Chapter 7 liquidation in the bankruptcy court for the Western District of Virginia. Thereafter, Smith filed a "Complaint to Set Aside Preferences," contending that the "preferential" transfer of estate assets to the Warthens in satisfaction of their liens was precluded by 11 U.S.C. § 522(h). That subsection enables debtors to avoid the transfer of "property of the debtor" insofar as the debtor "could have exempted such property" under certain other provisions of the Bankruptcy Code.

In response, the Warthens moved to dismiss the Complaint as failing to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6), incorporated by Fed. R. Bankr. P. 7012(b). The Warthens asserted that, because Smith's complaint did not allege that he actually exempted the Real Property, Smith lacked standing under § 522(h) to avoid the liens.

Before the motion to dismiss could be heard, Smith filed an amended complaint, along with a "Motion to Avoid Judicial Liens." The latter was submitted pursuant to 11 U.S.C. § 522(f)(1), which provides that "the debtor may avoid the fixing of [certain judicial or other] lien[s] on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under [federal or state law]." The motion and the amended complaint each sought alternative relief under 11 U.S.C. § 506(d) in the event that Smith would not prevail with respect to either § 522(f) or § 522(h). Section 506 provides, in pertinent part:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest...is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...and is an unsecured claim to the extent that the value of such creditor' s interest...is less than the amount of such claim.
>
> ...
>
> (d) to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void....

11 U.S.C. § 506 (emphasis added). With no factual issues to be resolved, the dispute centered exclusively on the proper application of the law. Each side moved for summary judgment, asserting that their interpretation was the correct one. See Fed. R. Bank. P. 7056; Fed. R. Cir. P. 56(c).

C. By its Order and Memorandum Opinion of May 21, 1999 ("BR Op."), the bankruptcy court rejected

Smith's arguments as to § 522(f) and § 522(h). The court, in agreement with the Warthens, determined that Smith could not avoid the liens under either subsection because he had failed to take the proper measures to perfect (or even claim) an exemption in the Real Property. Notwithstanding that the two subsections speak of exemptions to which Smith "would have" been entitled or that he "could have" otherwise taken, the court concluded that Smith was required to have actually exercised his exemption.[1]

The bankruptcy court nonetheless awarded summary judgment to Smith on the ground that the Warthens' liens were void under § 506(d). In so ruling, the court acknowledged the decision in Dewsnup v. Timm, 502 U.S. 410 (1992), in which the Supreme Court held that both the secured and unsecured portions of the type of claim referenced in § 506(a) are, in their totality, a "secured" claim within the meaning of § 506(d). Id. at 417. The Court concluded that, under the terms of the statute, the $120,000 lien on the debtor's property could not be partially voided -- "stripped down"-- to reflect its $39,000

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[1] According to the bankruptcy court, "The debtor, by not claiming an exemption on this property, has demonstrated his lack of interest in such an exemption. As he has shown no interest in obtaining an exemption, he should not have an interest in protecting one." BR Op. at 6. The court distinguished Owen v. Owen, 500 U.S. 305,310-11 (1991) (holding that applicability of § 522(f) depends on whether lien impairs exemption to which debtor would have been entitled, rather than one to which the debtor is entitled in fact), on the ground that the debtor in Owen was precluded by state law from claiming the exemption. Smith's choice not to pursue an exemption in the Real Property was, by contrast, voluntary. On appeal, Smith has not argued that § 522 presents us with an alternative ground for affirmance; we therefore express no opinion as to the correctness of the bankruptcy court's ruling thereon.

value. In other words, a claim that is merely undersecured is still "secured" for the purposes of § 506(d); the attendant lien may only be voided if the claim is not "allowed." Id. at 415.[2]

The bankruptcy court distinguished the Supreme Court's holding in *Dewsnup*, concluding that § 506(d) indeed voided the Warthens' liens in their entirety because they were not merely undersecured, but "wholly unsecured." BR Op. at 12. Put another way, inasmuch as the amount of the senior lien created by the mortgage exceeds the value of the Real Property, there is nothing left to secure the Warthens' claims. Although the stripping down of a lien to some lesser amount is clearly prohibited by *Dewsnup*, the bankruptcy court discerned nothing in the Supreme Court's opinion that would preclude a worthless

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[2] A claim is deemed "allowed" if proof thereof is timely filed pursuant to Code section 501, and: (1) no objection is made thereto; or (2) the bankruptcy court, after notice and a hearing, determines the validity of the claim notwithstanding the objection of a party in interest. 11 U.S.C. § 502. The lien-voiding mechanism of § 506(d), however, does not apply to claims disallowed merely because no proof has been filed. See 11 U.S.C. § 506(d)(2) (excepting from operation of statute liens evidencing any claim that "is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title") (emphasis added).

No proof of the claims at issue were filed by any party. The Warthens maintain that, by the terms of the aforementioned exception, such failure precludes the application of § 506(d) in this case. The lower courts rejected the Warthens' position on the ground that Smith's amended complaint challenging the liens was a suitable proxy for a proof of claim. We agree that the argument advanced by the Warthens does not carry the day, but we think the better rationale is that their claims cannot be classified as "allowed secured claims" not only because they were not "allowed," but also because they were not "secured," as detailed infra.

lien from being "stripped off" to effectuate the broad policy goals of the bankruptcy laws.[3]

D. The Warthens appealed to the district court. See 28 U.S.C. § 158(a). By its Memorandum Opinion of March 14, 2000, the district court affirmed the judgment of the bankruptcy court, concluding that it "properly avoided appellants' judicial lien under 11 U.S.C. § 506(d)." Following the entry of the district court's judgment, the Warthens filed this appeal pursuant to 28 U.S.C. § 1291.

II.

We find ourselves in substantial agreement with the analysis and conclusions of the bankruptcy court, as seconded by the district court. Hence, except where explicitly noted herein, we are content to affirm the judgment below on the reasoning expressed by the lower courts in their memorandum opinions. Smith v. Warthen (In re Smith), No. 98-00093A (Bankr. W.D. Va., May 21, 1999); Smith v. Warthen (In re Smith), No. CA-99-53-3 (W.D. Va, Mar. 14, 2000).

AFFIRMED

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[3] In *Dewsnup*, the Supreme Court implicitly endorsed the view of the respondents therein that "the ' fresh start' policy cannot justify an impairment of [the lienholders'] property rights." Id. at 416. In this case, however, the Warthens' rights are not significantly impaired; if the Real Property were sold at market value, all of the proceeds would be used to satisfy the mortgage debt. Nothing would be distributed to the Warthens.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

IN RE: LARRY DANE SMITH, II	)	
Debtor.	)	
WILLIAM T. WARTHEN & HARRY J. WARTHEN, III,	)	CIVIL ACTION NO. 3:99CV00053
Appellants,	)	
	)	ORDER
v.	)	
LARRY DANE SMITH, II,	)	JUDGE JAMES H. MICHAEL, JR.
Appellee.	)	

This bankruptcy appeal is before the court pursuant to 28 U.S.C. § 158(a). The case presents the issue of whether a debtor can avoid a wholly unsecured judicial lien under 11 U.S.C. § 506(d). For the reasons stated in the accompanying opinion, it is this day

ADJUDGED AND ORDERED

that:

(1) The decision of the bankruptcy court shall be, and it hereby is, AFFIRMED;

(2) The appellants' motions for summary judgment as they relate to 11 U.S.C. § 506(d) shall be, and hereby are, DENIED; and

(3) The Clerk of the Court is hereby directed to strike the present case from the docket of this court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

IN RE: LARRY DANE SMITH, II	)	
Debtor.	)	
WILLIAM T. WARTHEN & HARRY J. WARTHEN, III,	)	CIVIL ACTION NO. 3:99CV00053
Appellants,	)	MEMORANDUM OPINION
v.	)	
LARRY DANE SMITH, II,	)	JUDGE JAMES H. MICHAEL, JR.
Appellee.	)	

William and Harry Warthen (the "appellants") are appealing the decision of the bankruptcy court to deny the appellants' Motions for Summary Judgment and to grant the Larry Smith's (the "appellee") motion to void the appellants' judicial liens under 11 U.S.C. § 506(d). Jurisdiction is invoked pursuant to 28 U.S.C. § 158(a).

I.

On June 30, 1998, a jury in the Circuit Court for the City of Richmond awarded judgments against the appellee to appellants totaling $336,722.41. The lawsuit was triggered by an auto accident in which the appellee was at fault. The jury awarded damages for permanent physical injury suffered by William Warthen, a minor at the time of the accident, as well as incidental medical costs expended by Williams' father, Harry Warthen. The appellants docketed the judgments in the land records of Fluvanna County, Virginia, on July 8, 1998, and thus obtained liens against the appellee's real property and improvements located at Route 1, Box 277D, State Route 631, Palmyra, Virginia (the "Real Property"). The appellee's interest in the Real Property is an undivided one-half interest as tenant in common. The Real Property has an assessed value of $64,600. Thus, the appellee's interest in the Real Property is $32,300. The property is burdened by a first mortgage in the amount of $70,768.38, for which the appellee is jointly and severally liable, predating the judicial liens at issue in this case. It is undisputed that the value of the Real Property is less than the amount of the debt secured by the first mortgage lien, which is superior to the appellants' judicial liens. As a result, the appellee has no equity in the Real Property.

On September 30, 1998, the appellee filed a bankruptcy petition pursuant to 11 U.S.C. § 701 *et seq.* in the Bankruptcy Court for the Western District of Virginia. The appellee has not listed the Real Property as exempt in his bankruptcy Schedule C, nor filed a homestead deed in the land records of Fluvanna County under the Virginia Code. Further, no proof of claim on behalf of the appellants was filed in the appellee's bankruptcy case. The appellee filed his motion to avoid judicial liens and

amended complaint prior to the bar date imposed by Fed. R. Bankr. P. 3004.

On September 30, 1998, the appellee filed a Chapter 7 bankruptcy petition in the Bankruptcy Court for the Western District of Virginia. The appellee then filed against the appellants a Complaint to Set Aside Preferences pursuant to 11 U.S.C. § 522(h). The appellants filed a Motion to Dismiss the Complaint under Fed. R. Cir. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012, for failure to state a claim upon which relief can be granted. Because the appellee's complaint did not allege an exemption in the real property encumbered by the appellants' judicial liens, the appellee lacked standing under 11 U.S.C. § 522(h) to avoid the appellants' judicial liens. Section 522(h) allows a debtor to avoid a preferential transfer of property only to the extent the debtor can claim an exemption in the property.

Before the appellants' Motion to Dismiss could be heard, the appellee agreed to amend his complaint. Thereafter, the appellee filed an Amended Complaint to Set Aside Preferences. The appellee also filed a Motion to Avoid Judicial Liens pursuant to 11 U.S.C. § 522(f), or alternatively, to have them declared void under 11 U.S.C. § 506(d). Section 522(f) allows a debtor to avoid certain judicial liens on the debtor's property that impair an exemption in the property to which the debtor is entitled. Each pleading also requested that the Bankruptcy Court void the appellants' judicial liens against the appellee's property pursuant to 11 U.S.C. § 506(d).

Because the facts of the case are undisputed, the appellants filed separate Motions for Summary Judgment relating to both the amended complaint and the motion to avoid judicial liens. The appellants claimed that the appellee was not entitled to avoid the appellants' judicial

liens under 11 U.S.C. §§ 522(f) or 522(h) because the appellee failed to properly perfect an exemption in his real property under state law. The appellants also claimed that the appellee lacked standing to void the appellants' judicial liens under § 506(d), but that even if the appellee had such standing, § 506(d) could not be used by a Chapter 7 debtor to void a lien under *Dewsnup v. Timm*, 502 U.S. 410 (1992), or where no proof of claim had been filed on behalf of the appellants.

The Bankruptcy Court heard arguments, and each party filed a post-argument memorandum. On May 21, 1999, the Bankruptcy Court entered an Order and corresponding Memorandum Opinion granting the appellants' motions for summary judgment as they pertained to 11 U.S.C. §§ 522(f) and 522(h). Because of the appellee's failure to perfect his state law exemptions, the Bankruptcy Court held that the appellee was unable to utilize these traditional avoiding mechanisms for debtors to avoid judicial liens.

However, the Bankruptcy Court denied both of the appellants' motions for summary judgment as they related to 11 U.S.C. § 506(d) and granted the appellee's motions under 11 U.S.C. § 506(d) contained in both the amended complaint and the motion to avoid judicial liens. The Bankruptcy Court held that, despite the Supreme Court's holding in *Dewsnup*, the appellee had the ability to use § 506(d) to void the appellants' judicial liens in their entirety because the liens were wholly unsecured. The appellants filed a timely Notice of Appeal from the Bankruptcy Court's Order as it pertained to 11 U.S.C. § 506(d). The appellee did not appeal the Bankruptcy Court's decision regarding §§ 522(f) and 522(h). Therefore, the only issue on appeal to this court is the propriety of the Bankruptcy Court's decision regarding the

appellee's ability to void the appellant's judicial liens under § 506(d).

II.

The district court reviews a bankruptcy court's findings of fact for clear error and conclusions of law de novo. *See Crossroads of Hillsville v. Payne*, 179 B.R. 486,487 (W.D. Va. 1995) (citing *In re Midway Partners*, 995 F.2d 490, 493 (4th Cir. 1993). The judicial liens held by the appellants are wholly unsecured and because they are not 'allowed secured claims,' the Bankruptcy court held that they are void under § 506(d) of the Bankruptcy Code. Section 506 provides:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest.. is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property... and is an unsecured to the extent that the value of such creditor's interest.., is less than the amount of such claim ....
>
> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void ....

11 U.S.C.A. § 506 (West 1993). In an effort to show § 506 does not apply, the appellants claim that the appellee does not have standing to void judicial liens under this section, that the holding in *Dewsnup* applies to the present case and that the judicial liens cannot be voided because the appellee did not file a formal proof of claim on behalf of the appellants.

A. Standing

The appellants rely on *Laskin v. First National Bank of Keystone (In re Laskin)*, 222 B.R. 872 (B.A.P. 9th Cir. 1998), in arguing that the appellee has no standing to avoid a lien under § 506(d). In *Laskin*, the debtors attempted to avoid a second mortgage which was wholly unsecured because the first mortgage exceeded the value of the property. Id. at 873. The court determined that 506(d) did not "explicitly confer an avoiding power on a Chapter 7 debtor." Id. at 875. Rather, "§ 506(d) provides the avoidance consequences of implementing a host of discrete powers conferred in other parts of the Code rather than acting as an avoiding power per se." Id. From this, the appellants urge that the appellee must have standing elsewhere in the Code in order to avoid the lien. The Fourth Circuit has not addressed the issue of standing in this context.

The appellee notes that nothing in § 506 or any other section of the Bankruptcy Code bars this section from applying in Chapter 7 cases. Section 506(d) contains two express exceptions from the attestation that liens that are not allowed secured claims are void, neither of which is the fact that the debtor is a Chapter 7 debtor. Further, one may denote from the Supreme Court's decision in *Dewsnup* that § 506(d) may be applicable to Chapter 7 cases. The Court went into a lengthy analysis of the legislative purpose of the statute. No where had the issue of standing been raised. Had the Court felt this were an issue, surely it would have addressed standing. Similar to the Supreme Court, the Bankruptcy Court below also did not mention the issue of standing even though it was raised by the appellants. For the foregoing reasons, this court

finds that standing is not a dispositive issue in the present case.

B. *Dewsnup* Can Be Distinguished From the Present Case

After § 506 was enacted into the Bankruptcy Code in 1984, courts generally found that "the plain language of § 506(a) meant that a creditor held a secured claim for the amount of the lien up to the value of the collateral and an unsecured claim for any amount of the lien over the amount of the value of the collateral." *Crossroads of Hillsville v. Payne*, 179 B.R. 486, 490 (W.D. Va. 1995). Further, courts went on to hold that the unsecured portion of a creditor's lien is to be avoided. See id. (citing *In re Crouch*, 76 B.R. 91 (Bankr. W.D. Va. 1987); *In re Lindsey*, 823 F.2d 189 (7th Cir. 1987); *In re Folendore*, 862 f.2d 1537 (11th Cir. 1989); *In re O'Leary*, 75 B.R. 16 (C.D. Ill. 1986); *In re Mays*, 85 B.R. 955 (Bankr. E.D. Pa. 1988)). The Supreme Court decision of *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), changed the general understanding of this statute.

The appellants contend that *Dewsnup* expressly prohibits Chapter 7 debtors from "stripping off" a creditor's lien under § 506(d). However, *Dewsnup* prohibited "stripping down" a lien, not "stripping off." In *Dewsnup*, a debtor who filed a petition seeking liquidation under Chapter 7, attempted to eliminate a portion of a creditor's mortgage lien on real property to the extent the debt exceeded the value of the property. Id. at 413. The debt owed was approximately $120,000, but the value of the property was only $39,000. There were no liens superior to the mortgage. Id. The Court refrained from departing from the pre-Code rule that liens pass through bankruptcy unaffected and determined that § 506(d) did

not permit "stripping down" liens. Id. at 417. The Court emphasized the fact that a mortgage setting is consensual and something the debtor bargained for; thus, the creditor's lien should stay with the real property until foreclosure. Id. Further, the Court determined that § 506(a) was not the definitional provision for § 506(d), and that a lien should not be avoided unless the lien was disallowed or not secured by any collateral. Id. at 415. However, the Court recognized the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations, and thus, limited the holding in *Dewsnup* to the particular facts of the case. See id. at 416-17.

Several courts since *Dewsnup* have attempted to reconcile the holding with other fact patterns. For instance, in *Crossroads of Hillsville*, the court determined that the Supreme Court's decision applied to both consensual and nonconsensual liens. 179 B.R. at 490; *but see In re Yi*, 219 B.R. 394, 400 (E.D. Va. 1998) (emphasizing that a judgment creditor takes chances when attempting secure the judgment); *Howard v. National Westminster Bank*, 184 B.R. 644, 647 (Bankr. E.D.N.Y. 1995) (distinguishing *Dewsnup* from a case where the debtor was attempting to avoid a nonconsensual judgment lien). The precedent in the Western District is to apply the *Dewsnup* holding to both consensual and non-consensual liens; however, courts in other districts have recognized a distinction between bargained for liens and liens resulting from judgments.

In *Howard*, the value of the property was exceeded by the first mortgage leaving the defendant's judgment lien valueless. 184 B.R.. at 645. The court voided the defendant's lien by acknowledging that a judgment lien is non-consensual. Id. at 647. As a consequence, "one of the major underpinnings of *Dewsnup* does not apply. Unlike a

mortgagee, a judgment creditor takes its chances when attempting to secure the judgment. Therefore, if there is no property to secure the debt then the judgment remains unsecured." Id. Similar to *Howard*, the lien in the present case is a judgment lien. The parties did not enter into a consensual arrangement. The court finds the logic in Howard to be well reasoned and thus distinguishes the present case from *Dewsnup*.[1]

Courts have also tried to distinguish between liens that are wholly unsecured and liens partially unsecured as in *Dewsnup*. See *Howard*, 184 B.R. at 647; *In re Yi*, 219 B.R. 394, 397 (E.D. Va. 1998); *but see Davis v. America Gen. Fin. (In re Davis)*, No. 5-99-00022 (Bankr. W.D. Va. Oct. 26, 1999) (determining that it was improper to utilize § 506(d) to "strip off" a wholly unsecured indebtedness). The Bankruptcy Court found this distinction most influential in voiding the appellant's lien. In *In re Yi*, two prior liens exceeded the value of the debtor's property leaving Citibank's lien wholly unsecured. 219 B.R. at 395. The court distinguished the *Dewsnup* case and held that "stripping down" a lien was prohibited, however,

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[1] In *Crossroads of Hillsville*, the district court relied on a number of bankruptcy court decisions to determine that a judicial lien was subject to *Dewsnup*. The court went on to state: "[R]egardless of whether this court agrees or disagrees with the rationale of the *Dewsnup* decision, this court is bound by its holding and, thus, Crossroads' lien cannot be avoided by §506(d)." *Crossroads of Hillsville*, 179 B.R. at 490. This court is unpersuaded by the cases cited by the court in *Crossroads of Hillsville* as they merely assert *Dewsnup* is applicable to non-consensual liens. Whereas, the more recent case of *Howard* specifically analyzes why *Dewsnup* should not apply to non-consensual liens. Particularly relevant is the fact the *Dewsnup* not only emphasized that it was limited to its specific facts, but also stressed the bargained for setting in a consensual lien. *Dewsnup*, 502 U.S. at 417.

"stripping off" was not. Id. at 397. "Stripping down" a lien occurs when an undersecured lien is bifurcated and the unsecured portion is avoided, whereas "stripping off" occurs when the entire lien is avoided. Id. at 397 n.6. Thus, because the full value of Citibank's lien exceeded the value of the collateral, Citibank's claim was unsecured. Id.; *See also Wright v. Commercial Credit Corp.*, 178 B.R. 703, 707 (E.D. Va. 1995) (holding "[w]here there is no value underlying the claim, there is not a secured claim"). When a lien is unsecured it may be avoided under § 506(d).[2] As a result, this court should affirm the Bankruptcy Court on this basis.

C. Proof of Claim

The appellants argue that no proof of their claim has been filed in this case, and assert that where there has been no such filing, the debtor falls within an exception to the voiding provisions of § 506(d), and may not prevail. The pertinent portion of § 506(d) is:

> (d) To the extent that a lien secures a claim against the debtor that is not an

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[2] *Crossroads of Hillsville* is not dispositive of this issue. In that case, the lien in question was also wholly unsecured. However, the district court never mentioned this fact when determining that the holding in *Dewsnup* applied. Rather, the court focused the opinion on whether *Dewsnup* applied to non-consensual liens. This overlook of the secured versus unsecured distinction may be the result of the time period when the case was decided. *Crossroads of Hillsville* was decided in March 1995. The *Howard* case, which appears to be the first to give relevance to this distinction, was decided in August 1995. Thus, *Crossroads of Hillsville* should not be given much precedential weight in this regard.

> allowed secured claim, such lien is void unless...
>
> > (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d)(2). To support this claim, the appellants cite *Painter v. First Federal Savings & Loan Assoc.* (*In re Painter*), 84 B.R. 59, 62 (Bankr. W.D. Va. 1988). In *Painter*, no proof of claim was filed by any party before the bar date for filing such claim. The court reasoned that "some form of a timely proof of claim be filed before the issue of allowability can be raised."

When no proof of claim is filed before the bar date, for purposes of § 506(d) the only known reasons that the creditor's claim is not an allowed secured claim is due to the failure of any entity to file a proof of such claim. Under those circumstances, the case would fall into the § 506(d)(2) exception. See id. at 62. The present case can be distinguished from *Painter* because the appellee filed both his motion to avoid the liens and his adversary complaint requesting § 506 evaluation within the 90 day statutory period for proof of claim filing.

Further, in *Wright v. Commercial Credit Corp.*, 178 B.R. 703,705 (E.D. Va. 1995), the court determined that when a bankruptcy court is asked "to determine the extent of a lien or the value of the collateral forming the basis of the lien, adversary proceedings are required." Id. at 705. The court did not require that a proof of claim be filed, but recommended that the debtor inform the creditor that it intended to reevaluate a secured claim under § 506. This

notification would ensure that the creditor received due process protection. See id.; *But see Dembo v. United States*, 126 B.R. 195; 200 (E.D. Pa. 1991) (holding failure to file a proof of claim for the entire mount of secured creditor's claim bars a § 506 proceeding). The court held that an adversary proceeding is necessary to determine the status of the lien. See *Wright*, 178 B.R. at 706.

In response to the appellee's request of the Bankruptcy Court to void the appellants' judicial liens against the appellee's property pursuant to § 506(d) in both the amended complaint and the motion to avoid judicial liens, the Bankruptcy Court afforded such an adversary proceeding. A complaint in such an adversary proceeding is sufficient to constitute a proof of claim. See 4 L. King, *Collier on Bankruptcy* [506.0614][b][i] ("Most courts do not require that proof of claim be filed prior to lien avoidance under section 506(d). Thus, complaints or applications to determine the status of the relevant claim under section 506(a), or similarly styled pleadings, have been accepted as the requisite request under section 506(d) for allowance or disallowance. This appears to be the better view."). Thus, the pleadings which were filed prior to the bar date may substitute for the proof of claim. As a result, this court should affirm the decision of the Bankruptcy Court.

III.

The court finds that the appellee not only had standing to avoid the appellants' judicial lien and had filed a sufficient substitute for a proof of claim, but that the present case can be distinguished from *Dewsnup* in that appellants' lien was nonconsensual and wholly unsecured. As a Consequence, the bankruptcy court properly avoided

appellants' judicial lien under § 506(d). Thus, this court affirms the decision of the bankruptcy court.

An appropriate order this day shall issue.

ENTERED: /s/
Senior United States District Judge

3/14/00
Date

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

In re: LARRY DANE SMITH II	)	Chapter 7
	)	Case No. 98-
	)	02988-WA3-7
Debtor,	)	
	)	
	)	
LARRY DANE SMITH II	)	
	)	
Plaintiff,	)	
	)	Adversary Proceeding
v.	)	No. 98-00093A
	)	
WILLIAM T. WARTHEN and	)	
HARRY J. WARTHEN III,	)	
	)	
Defendants.	)	

ORDER

The plaintiff, debtor Larry Dane Smith II, has moved to avoid or void judicial liens held by the defendants, William T. Warthen and Harry J. Warthen III ("the Warthens"). In return, the Warthens have moved for summary judgment. For the reasons stated in the Memorandum Opinion filed simultaneously herewith, this Court finds that because he has not attempted to claim an exemption in his property, Mr. Smith need not and may not avoid the judicial liens held by the Warthens under § 522 to protect any such exemption from impairment. He may, however, void the judicial liens under § 506(d) as they are wholly unsecured. It is therefore that the debtor's

motion to void judicial liens under 11 U.S.C. § 506(d) is GRANTED. The debtor's motion to avoid judicial liens under § 522 is DENIED. The defendants' motions for summary judgment with respect to § 522 are GRANTED. The defendants' motions for summary judgment with respect to § 506(d) are DENIED.

The Clerk shall distribute copies of this Order to: W. Stephen Scott, Chapter 7 trustee; C. Lamar Garren, Counsel for the debtor; Katrina Clark Forrest, Counsel for William T. Warthen and Harry J. Warthen, III; and the debtor.

Dated: May 21, 1999

/s/ William E. Anderson
William E. Anderson
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

In re: LARRY DANE SMITH II	)	Chapter 7
	)	Case No. 98-02988-WA3-7
Debtor,	)	
	)	
LARRY DANE SMITH II	)	
Plaintiff,	)	
	)	Adversary Proceeding
v.	)	No. 98-00093A
WILLIAM T. WARTHEN and HARRY J. WARTHEN III,	)	
Defendants.	)	

MEMORANDUM OPINION

The plaintiff, debtor Larry Dane Smith II, has moved to avoid or void judicial liens held by the defendants, William T. Warthen and Harry J. Warthen III ("the Warthens"). In return, the Warthens have moved for summary judgment.

Facts

Mr. Smith has an undivided half interest as tenants in common in a piece of property in Fluvanna County worth $64,600. His interest is therefore $32,300. The first mortgage lien ("first lien") on the property is $70,768.38,

exceeding the value of the property. As a result, Mr. Smith has no equity in the property.

On June 30, 1998, the Warthens won judgments against the debtor in a personal injury matter in the City of Richmond Circuit Court totaling $336,722.41. On July 8, 1998, they docketed their judgments in the land records of Fluvanna County, thereby obtaining judicial liens against the debtor's property that was already burdened by the senior mortgage lien.

On September 30, 1998, the Debtor filed a bankruptcy petition under Chapter 7. The debtor has not listed the property as exempt in his bankruptcy Schedule C, nor filed a homestead deed in the land records of Fluvanna County under the Virginia Code. The debtor has utilized all but $2,116 of his available homestead exemption on property not at issue here. No proof of claim on behalf of the Warthens has been filed in the bankruptcy case.

The debtor filed a motion to avoid the judicial liens under 11 U.S.C. § 522(f), or alternatively, to have them declared void under 11 U.S.C. § 506. He also instigated this adversary proceeding, in which he has sought to avoid the judicial liens under § 522(h), or, alternatively, to have them declared void under 11 U.S.C. § 506. In return, the Warthens filed two motions for summary judgment, one in each action. The Court heard argument on the motions in Charlottesville on March 22, 1999. Following the argument, both parties submitted briefs in further support of their positions.

The parties do not dispute any of these facts.

Discussion

Rule 56 of the Federal Rules of Civil Procedure governs the issuance of summary judgment. That rule is made applicable to adversary proceedings in bankruptcy by Bankruptcy Rule 7056. Under Rule 56, summary judgment is appropriate when the evidence before the Court establishes that there is "no genuine issue as to any material fact." Fed. R. Cir. P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The trial judge" shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." Id. at 250. Both parties contend, and the Court agrees, that there is no genuine issue of material fact. Therefore, summary judgment is appropriate.

The debtor seeks to avoid or void the judicial liens held by the Warthens. Although several motions are at issue, essentially his argument boils down to two sections of the Bankruptcy Code. Mr. Smith seeks first to avoid his liens under § 522, and if that section proves unavailing, he seeks to void the liens under § 506. The Warthens, naturally, contest both of these alternative theories. The Court will examine both theories in turn.

Section 522

Mr. Smith contends that there are two different subsections of § 522 that will allow him to avoid the judicial liens.

A. Section 522(f)

Under § 522(f), "a debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent

that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is . . . a judicial lien." It is undisputed that Mr. Smith could have taken an exemption for a portion of his interest in his property pursuant to Va. Code Ann. § 34-4. It is also undisputed that he has not claimed an exemption for his-property, nor filed a homestead deed.

Mr. Smith makes much of the fact that the 1994 amendments to the Bankruptcy Code added a mathematical formula to § 522 to determine when an exemption is impaired. He argues that the judicial liens should be avoided, as his exemption is impaired under the formula because with respect to each of the judicial liens, the sum of the lien, the senior mortgage, and the amount of the exemption exceeds the value of his interest in the property, absent any liens. Mr. Smith does indeed apply the formula correctly, and the Warthens concede that if § 522(f) were applicable to this case, the formula would result in impairment.

Unfortunately for Mr. Smith, however, he is putting the cart before the horse. As the Warthens point out, the debtor has not claimed the property as exempt in his bankruptcy schedules, has not followed the steps required to perfect a homestead exemption under Virginia law, and the time for doing so has expired.[1] The debtor argues that

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[1] To perfect a Virginia homestead exemption, the debtor must file a homestead deed in the land records of the appropriate county. See Va. Code Ann. § 34-6 (Michie Supp. 1998). "To claim an exemption in bankruptcy, a householder who (i) files a voluntary petition in bankruptcy shall set such real or personal property apart on or before the fifth day after the date initially set for the meeting held pursuant to 11 U.S.C. § 341, but not thereafter." Va. Code Ann. § 34-17.

the fact that he has not claimed the property as exempt is irrelevant. He states that the language of § 522(f), especially that of the subsection establishing the mathematical formula for determining impairment at § 522(f)(2)(A), does not require that the exemption to be impaired be anything more than hypothetical.

As support for his theory that his exemption need only be available to him and not actually taken, the debtor cites a Supreme Court opinion which held that there need not be an actual exemption. See Owen v. Owen, 500 U.S. 305, 310-11 (1991). In that case, under the Florida exemption scheme, a homestead exemption was not assertable against pre-existing judicial liens. The Court found that a fair and proper application of § 522(f) was to "ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he *would have been* entitled but for the lien itself." Id. at 310-11 (emphasis in original).

The Supreme Court in Owen, however, dealt with a different issue than is faced here. In that case, the difficulty with determining whether the lien at issue could be avoided for impairing an exemption was not that the debtor had not attempted to take one, but that the debtor had not been able to take one because of the liens under the pertinent state statutory structure. See Owen, 500 U.S. at 309. The rule of Owen is simply that the baseline against which impairment is to be measured is an exemption that the debtor could have claimed "but for the lien at issue."

As a result, Owen cannot be extended to mean that the debtor need not even attempt to take an exemption. In this case, no statutory structure prohibited Mr. Smith from attempting to claim an exemption. Therefore, the Court

finds that § 522(f) is unavailable to a debtor who has not attempted to claim an exemption on the property encumbered by the lien to be avoided. Section 522(f) is meant to protect exemptions that might be impaired by a lien. The debtor, by not claiming an exemption on this property, has demonstrated his lack of interest in such an exemption. As he has shown no interest in obtaining an exemption, he should not have interest in protecting one. This Court has previously recognized that a debtor may not avoid a creditor's lien under § 522(f) if the debtor has not perfected his exemptions. See Tarplev v. HUD (In re Tarplev), 123 B.R. 741, 742-45 (Bankr. W.D. Va. 1991). See also In re Wall, 127 B.R. 353, 355-56 (Bankr. E.D. Va. 1991) ("In light of § 522(f)'s purpose to promote a fresh start, . . . it does not make sense to allow lien to be avoided on property that has not been claimed exempt."); In re Dardar, 3 B.R. 641, 642 (Bankr. E.D. Va. 1980) (finding that the debtors "shall not be permitted to avoid the lien held by [the creditor] in respect to property not specifically declared exempt").

B. Section 522(h)

Mr. Smith also seeks to use another subsection of § 522 to set aside the Warthens' judicial liens as preferences. That section states:

> The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g) (1) of this section if the trustee had avoided such transfer . . . .

11 U.S.C. § 522(h). Here again, the debtor seeks to avoid the judicial liens with another section that is meant to protect exemptions. The purpose behind the section is to allow a debtor to protect his exemptions in limited situations where the trustee could have done so through use of his avoiding powers but did not do so. The rationale behind § 522(h) is essentially the same as that behind § 522(f), and therefore, so is the outcome for the debtor. Where the debtor has not attempted to claim an exemption, he is not permitted to attempt to protect an exemption he never claimed. Courts have found that a debtor lacks standing to obtain relief under § 522(h) if he has not claimed an exemption. See Owen v. Treadway (In re Owen), 169 B.R. 261, 263 (Bankr. D. Me. 1994); Moorer v. Moorer (In re Moorer), No. 94-6171, 1994 WL 717959, at *2 (Bankr. D. Idaho Dec. 2, 1994).

Section 506

Mr. Smith makes the alternate argument that if the judicial liens are not avoidable under § 522, they are void under § 506. That section provides:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.
>
> (d) To the extent that a lien secures a claim against the debtor that is not not allowed secured claim, such lien is void . . .

11 U.S.C. § 506. This argument presents to this Court the question of whether the judicial liens are secured under the language of § 506.

A. Stripping Down or Stripping Off: Dewsnup

Mr. Smith points out that his interest in the property is $32,300, and the property is already securing a first mortgage lien that exceeds the amount of his interest. As a result, there is no equity in the property left to secure the junior judicial liens held by the Warthens. Therefore, he argues, the judicial liens are unsecured, cannot be "allowed secured claims," and as such, are void under § 506(d).

The Warthens argue that the liens are secured and not voidable under the Supreme Court's decision in Dewsnup v. Timm, 502 U.S. 410 (1992). In that case, the debtor owned a piece of property worth $39,000. The creditor had a lien on the property for $119,000. The debtor argued that § 506, read as a whole, required that the creditor's lien be "stripped down" from $120,000 to the value of the property, or $39,000. In other words, the debtor argued that because § 506(a) states that an allowed claim is secured only to the value of the property, then whatever amount of the claim exceeded the value of the property was unsecured. She then argued that the claim should be separated into two claims, the secured portion and the unsecured portion, and then the unsecured portion was void under § 506(d). The Supreme Court rejected this argument, and found that a lien secured by any amount of collateral is secured in full, and that a single lien could not be bifurcated and "stripped down" in the manner proposed by the debtor.

At least two Virginia courts have grappled with the issues presented by the Supreme Court's holding in Dewsnup, and have arrived at different conclusions on similar facts. See Yi v. Citibank (Md.), N.A. (In re Yi), 219 B.R. 394 (E.D. Va. 1998); Crossroads of Hillsville v. Payne, 179 B.R. 486 (W.D. Va. 1995). Each of the parties in this case vigorously urges that this Court adopt the reasoning of one of these decisions, but not, of course, the same one. In Crossroads, the court was faced with a debtor seeking to void a judicial lien on property worth $147,500 and encumbered by senior liens that exceeded the value of the property. The court followed Dewsnup and its progeny in finding that "'undersecured liens [must] pass through chapter 7 bankruptcy proceedings unaffected by the proceeding except for the discharge of the personal liability of the debtor.'" Crossroads, 179 B.R. at 491 (quoting In re Doviak, 161 B.R. 379, 382 (Bankr. E.D. Tex. 1993)). Although the Crossroads court did note that "the Court in Dewsnup was careful to strictly limit its holding to the facts of that particular case," see id. at 490, the court made no attempt to distinguish its facts from those of the Supreme Court case.

The Eastern District of Virginia did, however, distinguish its facts, in an extremely well-reasoned and recent opinion by Judge Ellis. See Yi, 219 B.R. 394. In that case, the debtors owned property that was encumbered by three liens, the first two of which greatly exceeded the value of the property. As was true in Crossroads and in this case, the debtors had no equity in their property. They sought to avoid the third lien, which they claimed was wholly unsecured, on the basis that the first two liens had eaten up all the equity, leaving no collateral to secure the third lien. The court agreed that the third lien was unsecured, finding that "a claim will be considered 'secured' whenever the collateral retains any value not

pledged to other creditors. In the instant case, however, the collateral has retained no value; the full value (and more) has been pledged to senior creditors. And a lien to which no collateral attaches is unsecured." Yi, 219 B.R. at 399. The court distinguished Dewsnup, noting that Dewsnup involved an undersecured lien, as opposed to a lien that was entirely unsecured. Judge Ellis determined that although Dewsnup prohibits "stripping down," it does not prohibit "stripping off" a lien wholly unsecured by any collateral. Because the liens were unsecured, the court found that they could not possibly be "allowed secured claims" within the meaning of § 506(d), and found that the unsecured third lien was void. Id. at-399.

This Court is faced with a debtor who owns an interest in property that is encumbered by liens that greatly exceed the value of the property. As was true of the debtors in Yi and Crossroads, he seeks to avoid liens on the property that are unsecured by any equity in the property. Although the two courts came to opposite conclusions on similar facts, this Court finds that the approach taken in Yi is the more thoughtful and better reasoned one. The debtor in Crossroads attempted to distinguish his case from Dewsnup by pointing out that his lien was nonconsensual and that of the debtor in Dewsnup was consensual. The Crossroads court, in following Dewsnup, ruled with the majority of courts and found that Dewsnup governs both consensual and nonconsensual liens. The court was never faced with, and did not reach, the question of the difference between unsecured and undersecured. Dewsnup applied § 506 to an undersecured lien, not to wholly unsecured liens as in this case. The judicial liens at issue in this case are wholly unsecured under Yi. As a result, they are void under § 506(d).

B. Proof of Claim

Defendants argue that no proof of the Warthens' claim has been filed in this case, and assert that where there has been no such filing, the debtor falls within an exception to the voiding provisions of § 506(d), and may not prevail. The pertinent portion of § 506(d) is:

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless -
>
> . . .
>
> (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title·

In support of their argument, defendants cite Painter v. First Federal Savings & Loan Association (In re Painter), 84 B.R. 59, 62 (Bankr. W.D. Va. 1988). The debtor in Painter asserted that a complaint filed to determine status of a lien could constitute a proof of claim filing, and cited Brager v. Blum (In re Brager), 28 B.R. 966, 967 (Bankr. E.D. Pa. 1983) to support her argument.[2]

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[2] The U.S. District Court for the Western District of Virginia has sharply criticized the holding in Brager in a case in which a Chapter 13 plan that bifurcated claims into secured and unsecured claims was confirmed before the creditor had an opportunity to file a proof of claim. Piedmont Trust Bank v. Linkous (In re Linkous), 141 B.R. 890 (W.D. Va. 1992). The court held that even assuming such a plan constituted a valuation petition, such a petition would not constitute an allowed claim. This Court finds that the court in Linkous was concerned primarily with the issue of allowability for purposes of § 506(a) and not with whether a complaint may constitute a proof of

(continued . . .)

The Painter court implicitly recognized the validity of the Brager holding, but held that "the complaint which is to serve as the assertion of the claim must be filed before the bar date for filing claims'" Painter, 84 B.R. at 62. In Painter, the debtor filed her 'complaint after the bar date for filing proofs of claim. That case is distinguishable from the instant case. Here, the Warthens do not contest that Mr. Smith filed both his motion to avoid the liens and his adversary complaint within the 90 day statutory period for proof of claim filing. Therefore, he has filed a proof of claim. The Warthens' attempt to take this dispute out of § 506(d) fails.

Conclusion

For the foregoing reasons, this Court finds that because he has not attempted to claim an exemption in his property, Mr. Smith need not and may not avoid the judicial liens held by the Warthens under § 522 to protect any such exemption from impairment. He may, however, void the judicial liens under § 506(d) as they are wholly unsecured.

The Clerk shall distribute copies of this Memorandum Opinion to: W. Stephen Scott, Chapter 7 trustee; C. Lamar Garren, Counsel for the debtor; Katrina Clark Forrest, Counsel for William T. Warthen and Harry J. Warthen, III; and the debtor.

claim for purposes of the application of the exception to § 506(d), and is therefore distinguishable.

Dated: May 21, 1999

/s/ William E. Anderson
William E. Anderson
U.S. Bankruptcy Court Judge

SECTION 502 (11 U.S.C. § 502)

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is expected from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for

which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e) (1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the

same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under Chapter 9, 11, 12 or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any

additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment of transfer made to such creditor.